State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 1801/Derry Public Works Complainant v. Town of Derry Respondent	*	Case No: A-0413-35 Decision No. 2005-022

APPEARANCES

Representing AFSCME Local 1801/Derry Public Works:

Katherine M. McClure, Esq.

Representing Town of Derry:

Mark T. Broth, Esq.

BACKGROUND

AFSCME Local 1801/Derry Public Works (hereinafter "Union") filed an unfair labor practice complaint with the Public Employee Labor Relations Board ("PELRB" or "Board) on August 31, 2004 alleging that the Town of Derry (hereinafter "Town") committed unfair labor practices in violation of RSA 273-A:5 I (e), (g), (h) and (i), as well as RSA 273-A:4, by failing to uniformly apply the results of an arbitration award. More specifically, the Union states that an arbitration award was issued on December 2, 2002 that sustained the grievance of Ronald Faverty ("Faverty grievance" or "Faverty award") relative to his loss of long-term disability retirement benefits under Article 14.3 of the parties' collective bargaining agreement ("CBA"). It argues that since this decision constitutes a binding interpretation of contract language, the Town is obligated to apply its precedent to other similarly effected employees, namely Ralph Leone, Frederick Hooley, and Al Hayward. The Town filed its answer denying the Union's charge on September 15, 2004. While the Town generally admits to the factual chronology as described in the Union's complaint, it denies that it has committed any improper labor practice. It asserts, among other things, that since the Union seeks to expand the scope of the arbitrator's award, so that it may be applied to other individuals who were not parties to the original grievance, the PELRB lacks jurisdiction in this matter.

A pre-hearing conference was convened at PELRB offices on September 27, 2004. Pursuant to the Pre-hearing Memorandum and Order issued on September 29, 2004 (PELRB Decision No. 2004-160),

the parties' representatives were directed to meet, or otherwise confer, in an attempt to reach a stipulation on presenting the instant case by written submission, or, in the alternative, without the need for formal testimony. As referenced in an Order dated October 27, 2004 (PELRB Decision No. 2004-172), counsel for the Union provided notification to the PELRB on October 14, 2004 of the parties' agreement to present the instant case by filing joint stipulations of fact and respective memorandums of law with the Board on or before December 3, 2004. The date for filing was subsequently extended to December 21, 2004 and, following receipt of the parties' documentation on that date, the record was closed. Upon review of all filings submitted by the parties and a consideration of the "Joint Stipulation of Facts," incorporated as findings of fact paragraphs 3 through 14 below, the Board determines the following:

FINDINGS OF FACT

1. The Town of Derry ("Town") is a public employer within the meaning of RSA 273-A:1 X.

2. AFSCME Local 1801 ("Union") is the duly certified exclusive bargaining representative for "[a]ll employees actively and regularly engaged in the Department's work or enrolled on the regular payroll of the Town except management and supervisory employees, temporary and part-time employees (less than 20 hours per week). Description of Unit: Custodians I & II, Laborers I, Motor Equipment Operator I, II & III, Utility Worker (Laborer II), Mechanics I & II, Chief Mechanic, Sewerage Treatment Operator I & II, Foremen and Utilities Supervisor. (Joint Exhibit No. 2).

3. The Union represents certain employees of the Town's Public Works Department. See Joint Ex. 2 (Copy of Certification Issued by the PELRB).

4. In the summer of 2001, Ronald Faverty applied for long-term disability (hereinafter "LTD") retirement. See Improper Practice Charge, Attachment A ¶ 6 (Aug. 6, 2004). Prior to his disability retirement, Mr. Faverty was a thirteen (13) year employee of the Town's Public Works Department. See Joint Ex. 1 (Arbitration Award) at 2.

5. The Town and the Union are parties to a collective bargaining agreement (hereinafter the "CBA") which provides benefits for bargaining unit members who suffer a non-work related disabling illness or injury. See Joint Ex. 3 (Collective Bargaining Agreement, Ending June 30, 2004), Article 14.3. Article 14.3 of the CBA provides, in pertinent part:

> employees covered by this Agreement shall receive a wage continuation benefit equal to sixty percent (60%) of regular gross earnings up to age sixty-five (65) for long term disability including sickness provided that an insurance policy can be purchased for this coverage.

6. When Mr. Faverty began receiving LTD payments, he was not receiving any other disability benefits, and thus, the Town's LTD insurance company paid to him a benefit equal to sixty percent (60%) of his basic monthly benefits. See Joint Ex. 1 at 2. However, as Mr. Faverty was a municipal employee with over ten (10) years of service, he was also eligible for disability retirement benefits under the New Hampshire Retirement System (hereinafter the "NHRS"). Id. Under the NHRS, Mr. Faverty was entitled to benefits between 25 percent (25%) to fifty percent (50%) of his compensation. Id.

7. Mr. Faverty began to receive NHRS disability benefits subsequent to the start of his LTD retirement. Id. Upon learning that he had begun to receive disability benefits through the NHRS, the LTD's insurance company, in accordance with the terms of the Town's LTD

policy, began to offset Mr. Faverty's disability payments "such that he received 60% of his gross weekly earnings when the two sources were combined." Id.

8. Mr. Faverty grieved the offset in the LTD payments that he received from the Town's insurance company and ultimately sought arbitration. At the arbitration hearing, the parties stipulated to the narrow issue of "Did the Town violate Article 14.6 [sic] when it did not provide Mr. Faverty 60% of gross earnings for long term disability?" Id. at 1.

9. At arbitration, the Union requested that Arbitrator Michael C. Ryan (hereinafter "Arbitrator Ryan") interpret Article 14.3 as requiring the Town to provide a LTD benefit equal to sixty percent (60%) of regular pay, without any offsets for monies received from collateral sources. Id. at 4-5. By decision dated December 2, 2002, Arbitrator Ryan found in favor of the Union. Id. at 12. After the decision was issued, the Union and the Town disagreed over the amount Mr. Faverty was entitled to under Article 14.3, which resulted in Arbitrator Ryan issuing a clarification to his decision. See Joint Exhibits 4-10.

10. Mr. Faverty became eligible for LTD benefits in and around January of 2001.

11. By letter dated April 22, 2004, the Union requested that the Town apply the Faverty arbitration to three (3) employees (Ralph Leone, Frederick Hooley and Al Hayward). See Joint Ex. 11.

12. Mr. Hayward was eligible for LTD benefits in and around October 1997, which is prior to Mr. Faverty filing the grievance. See generally Joint Ex. 15.

13. Mr. Hooley and Mr. Leone became eligible for LTD benefits in and around January 2002 and August 2002 respectively, which is before Arbitrator Ryan issued his decision.

14. Since the time the Arbitration award was rendered a successor collective bargaining agreement has been negotiated between the parties. The contract language concerning LTD benefits was not changed through those negotiations.

15. Neither Mr. Hayward, Mr. Hooley, nor Mr. Leone filed a grievance challenging the computation of their LTD benefits under the CBA.

16. The Union did not file a "class action" grievance regarding the issue, nor did it raise the circumstances of Mr. Hayward, Mr. Hooley or Mr. Leone (or whether the outcome of the arbitration would apply to them), during the course of the Faverty arbitration held on September 4, 2002 or prior to the issuance of the award on December 2, 2002.

17. By letter dated July 28, 2004, the Town notified the Union that "the Union's request that the Faverty arbitration award be applied retroactively is respectfully denied...[, but that]...the Town will apply the Faverty award to any individuals who qualify for LTD benefits subsequent to the award." (Joint Exhibit No. 15).

18. Article IX, Section 9.2 of the CBA contains the parties' grievance procedure, "Step Four" of which provides for arbitration. It reads, in pertinent part, that "[t]he decision of the arbitrator shall be final and binding on the parties." (Joint Exhibit No. 3, p. 12). The CBA is silent as to the precedential effect of arbitration awards.

ORDER

JURISDICTION

The Union's complaint alleges that the Town has violated RSA 273-A:5 I (e), (g), (h) and (i) as a result of its failure to uniformly apply the outcome of an arbitration award. Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *Appeal of State Employees Association of New Hampshire, Inc.*, 139 N.H. 441, 444 (1995). However, consistent with the Court's holding in *Appeal of State of New Hampshire,* 147 N.H. 106 (2001), we find that we lack jurisdiction in this case in order to consider whether or not the Faverty award should have precedential effect.

DISCUSSION

Where, as here, the parties' grievance procedure provides for final and binding arbitration, this Board does not regularly have jurisdiction to interpret the parties' CBA. *Appeal of State of New Hampshire*, 147 N.H. 106, 108 (2001). The New Hampshire Supreme Court has further stated that "[i]t is for the parties to bargain for each provision of a CBA, including whether to add a provision establishing a system of arbitral precedent. Absent bargained for provisions dictating arbitral precedent, the PELRB should not interpret CBAs to determine whether arbitral awards become the 'law of the contract.'" *Id.* at 109. We believe that the complaint before us asks us to make such an interpretation, which is prohibited under *Appeal of State*.

The record reflects that it was only Faverty who filed a grievance and that the grievance was never framed as a "class action." (Findings of Fact Nos. 8, 15 & 16, above). It is also clear from the stipulated issue presented to the arbitrator and the relief ordered in his award that the dispute only applied to Faverty. (Findings of Fact Nos. 8 & 9, above). Although it would appear that Hayward, Hooney and Leone were similarly entitled to receive the LTD benefits that were ultimately paid to Faverty through his grievance, we are without jurisdiction and authority to direct the payment of such relief, since it would require us to impose a precedential effect of the award that is beyond our jurisdiction. "Whether such arbitral awards should be...given precedential effect falls squarely within a determination of the arbitrator's authority, which itself is 'a question of contract interpretation' that the parties have delegated to the arbitrator." *Id.* at 109, 110 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 765 (1983)). Here, in the arbitrator's final and binding award, he makes no "clear and unequivocal statement of precedential effect" (*Id.* at 110), that would otherwise permit us to exercise jurisdiction and enforce a broader application of the award.

We recognize that the Town has now agreed to apply the Faverty award to any individuals who qualify for LTD benefits *subsequent* to the award. (See Joint Exhibit No. 15). Based upon this acknowledgment, the Union submits that the Town must now uniformly apply the same level of benefits to Hayward, Hooley and Leone. However, these individuals qualified for LTD benefits *before* the issuance of the award, and, indeed, *prior to* the arbitration hearing. We therefore see no rationale for why the grievance could not have been pursued as a "class action" or the issue of the precedential effect of the award raised and preserved in advance of its issuance.

Under the Union's argument, a finding in favor of an individual grievant on one occasion, and an employer's acceptance of that decision, could theoretically trigger liability against that employer for many prior occasions. We do not believe such a result is intended by the terms of RSA 273-A, nor would it foster harmonious relations between public employers and their employees. In this regard, the interests of the parties are best served through open communication and agreement, wherein the precedential effect, if any, of an arbitration award is preserved either through the drafting of the original grievance document,

during the framing of the issue(s) presented to the arbitrator or within the terms of the parties' mutually negotiated grievance procedure.

Accordingly, based upon the PELRB's lack of jurisdiction in this matter, the Union's improper practice charge against the Town is DISMISSED.

So ordered.

Signed this 16th day of March, 2005.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.

Distribution:
Katherine M. McClure, Esq.
Mark T. Broth, Esq.